(1)
Supreme Court, U.S.
FILED

081491 MAY 30 2009

OFFICE OF THE CLERK

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CARL R. WAGENKNECHT JR.
Petitioner,
V.
William W. Wilkins [Richard A. Levin],
TAX COMMISSIONER OF OHIO
Respondent.

On Petition For Writ Of Certiorari
To THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

Carl R. Wagenknecht Jr.
Petitioner, Pro Se
174 Cheltenham Lane
Munroe Falls, Ohio 44262
Telephone: 330-388-8968

QUESTIONS PRESENTED

I. Whether the State of Ohio which includes but is not limited to the Ohio Tax Commissioner and the Ohio Department of Taxation has the legal authority to enter into a contractual relationship with the Internal Revenue Service that eliminates a Citizen's guaranteed constitutional rights.

II. Whether the Ohio Tax Commissioner is required to verify that a Citizen of Ohio is a "person" "liable" for an income tax pursuant to the Internal Revenue Code before the Ohio Tax Commissioner can claim the Ohio Citizen has a state tax liability based upon the alleged federal tax liability.

III. Whether an Ohio Citizen has an absolute right to present evidence and testimony without a prerequisite to the Ohio Tax Commissioner that information received from the IRS by the Ohio Tax Commissioner is not accurate , not truthful, not reliable, not correct and/ or obtained after the statute of limitations had expired

IV. Whether the Ohio Tax Commissioner has the legal authority to demand payment of an alleged tax owed and/or demand that an Ohio Citizen file a form(i.e. FORM 1040, IT-1040) that the Citizen is not required and/or prohibited by law to file as a condition precedent for the Tax Commissioner to have jurisdiction.

TABLE OF CONTENTS

Page

Questions Presented i
Table Of Authorities Cited v
Opinions Below 1
Jurisdiction 2
Constitutional Provisions 2
Statutes 2
Statement Of The Case 3
Reasons For Granting The Writ 9

A The State of Ohio contracted away Ohio Citizens guaranteed constitutional rights....9

B. An Ohio Citizen has the constitutional right to present evidence and testimony that information received from the IRS is not accurate, not truthful, not reliable, not correct and/or obtained after the statute of limitations expired 10

C. To require an Ohio Citizen to pay an access fee to seek relief for tax laws in the legal process is unconstitutional.....14

D. Ohio Tax Liability and Federal Tax Liability are mutually exclusive and therefore must be established independently.....17

E. The Ohio Tax Commissioner is required to verify that a Citizen of Ohio is a "person" "liable" for an income tax pursuant to the Internal Revenue Code before the Ohio Tax Commissioner can claim the Ohio Citizen has a state tax liability based upon the alleged federal tax liability.....19

F. The State of Ohio mandates that all Ohio Citizens are required to file Form 1040 is unconstitutional.....22

G. According to the Tax Commissioner a completed Form IT-1040 is a condition precedent to determine an Ohio Citizen's state tax liability.....26

H. The State of Ohio mandates that Petitioner violate 28 USC 1746.....27

I. The State of Ohio mandates that Petitioner violate ORC 5703.25 and ORC 5703.26 to complete and file Form IT-1040.....29

J. The Ohio Tax Commissioner demands that an Ohio Citizen make payment of an alleged tax owed and/or demands that an Ohio Citizen file a form(i.e. FORM 1040, IT-

1040) that the Citizen is not required and/or prohibited by law to file as a condition precedent for the Tax Commissioner to have jurisdiction.....32

K. ORC 5747.10 and ORC 5747.13 are unconstitutional as applied.....35

Conclusion 36

APPENDIX

The March 4, 2009 Reconsideration Entry of The Supreme Court of Ohio 37

The March 4, 2009 Opinion Entry of The Supreme Court Of Ohio..... 38

The December 31, 2008 Judgment Entry of The Supreme Court of Ohio 49

The December 31, 2008 Opinion Entry of The Supreme Court Of Ohio.....50

The December 21, 2007 Decision and Order of the Ohio Board Of Tax Appeals 62

The May 19, 2006 Final Determination by the Ohio Department of Taxation 68

Constitutional Provisions.....71

Statutes.....72

TABLE OF AUTHORITIES CITED

CASES

Page

Armstrong v. Manzo, 380 U.S. 545 (1965).....8,11
Beaty v. United States, 937 F.2d. 288,
(6th Cir. 1991).....13
Bothke v. Fluor Engineers and Constructors,
Inc. et al , 713 F. 2d 1405 (1983)..... 11
Botta v. Scanlon,
288 F.2d 504 (1961).....8, 19
Cleveland Gear Co. v. Limbach(1988),
35 Ohio St. 3d 229.....36
Dery v. Lindley(1979), 57 Ohio St.2d 5.....18
Escobedo v. Illnois, 378 U.S. 478 (1964).....8,11
Farrington v. Tennessee, 95 U.S. 679(1877).....8,17
Garner v. United States, 424 U.S. 648 (1976);...8,11.
Gulf Oil Corp. V. Kosydar (1975),
44 Ohio St.2d 208.....27
Heiner v. Donnan, 285 U.S. 312 (1932).....8,11
In re Payne, 430 F.3d 1055
(7th Cir. 2005) 31
Joint Anti-Fascist Comm. V Mc Grath,
341 U.S. 123 (1951).....8,11
McCulloch v. Maryland, 17 U.S. 316 (1819).....18
Roxane Laboratories, Inc. v. Tracy (1996), 75 Ohio
St.3d 125.....27
State v. Bob Manashain Painting, 121 Ohio.
Misc.2d. 99, 2002-Ohio-7444 15
U.S. v. Van Griffin, 874 F.2d 634
(9th Cir. 1989).....34

United States of America v. Hindenlang ,
164 F.3d 1029 (6th Cir. 1999).....30,31
United States v. Taylor
305 F.2d 183 (1962).....7,8,19
Vlandis v. Kline, 412 U.S. 441 (1973).....8,11
W. Union v. Brodt, 171 Ohio App.3d 434,
2007-Ohio-2742.....20
Wagenknecht v. United States, 533 F.3d412
(6th Cir. 2008).....5
Water Quality Ass.' v. United States,
795 F.2d 1303, (7th Cr. 1986).....6,7
Watson v. Commissioner of Internal Revenue
T.C. Memo. 2007-146(2007).....31

CONSTITUTIONAL PROVISIIONS

Page
United States Constitution
First Amendment.....2, 36
United States Constitution,
Fifth Amendment.....2, 15,22,36
United States Constitution,
Tenth Amendment.....2,22
Constitution of the State of Ohio,
Article I ¶ 1.....2,36
Constitution of the State of Ohio,
Article I ¶ 16.....2,15,36

STATUTES

26 USC 6011.....30,31,32
26 USC 6061 29
26 USC 6062.....29

26 USC 6063.....29
26 USC 6065.....29
26 USC 7701(a)(14).....19
28 USC 1746.....2,27,28,29
ORC 5703.25.....2,29
ORC 5703.26.....2,29,30
ORC 5747.08(E).....23
ORC 5747.10.....2,6,35,36
ORC 5747.13.....2,32,33,35,36

OTHER MATERIALS

IRM 20.1.1.2.1(6).....32
UCC 1-207.....30

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner, Carl R. Wagenknecht Jr., respectfully petitions for a writ of certiorari to review judgment of The Supreme Court of Ohio.

OPINIONS BELOW

The March 4, 2009 Reconsideration Entry of The Supreme Court of Ohio provided in Appendix at page 37.

The March 4, 2009 Opinion Entry of The Supreme Court of Ohio provided in Appendix at page 38.

The December 31, 2008 Judgment Entry of The Supreme Court of Ohio provided in Appendix at page 49.

The December 31, 2008 Opinion Entry of The Supreme Court Of Ohio provided in Appendix at page 50.

The December 21, 2007 Decision and Order of the Ohio Board of Tax Appeals provided in Appendix at page 62.

The May 19, 2006 Final Determination by the Ohio Department of Taxation provided in Appendix at page 68.

JURISDICTION

Judgments for review are the Judgment Entry and the Opinion of The Supreme Court of Ohio that were each entered on March 4, 2009 and the Judgment Entry and the Opinion of The Supreme Court of Ohio that were each entered on December 31, 2008. A timely Motion For Reconsideration filed on January 12, 2009 and was denied on March 4, 2009. The Court's jurisdiction is invoked under 28 USC ¶ 1257 and Article III of the Constitution of the United States of America.

This petition is timely filed within ninety days of that date, per Rule 13(1) &13(3), Rules of the Supreme Court of the United States

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

First, Fifth, and Tenth Articles of Amendment to the United States Constitution; Article I ¶ 1 and ¶16 of the Constitution of the State of Ohio; and Statutes codified at 5747.10, 5747.13, 5703.25, and 5703.26 of the Ohio Revised Code; and 28 USC 1746 are either set forth in the

body of the petition, or will be found in the Appendix.

STATEMENT OF THE CASE

Petitioner's Form IT-1040 Ohio Individual Income Tax Return for the tax year 1996 was mailed and received by the Ohio Department of Taxation or about October 20, 1997.

On April 15, 2000 Petitioner mailed to the Ohio Department of Taxation his affidavit executed on April 13, 2000 which explained that District Director Ashley Bullard of the Internal Revenue Service (IRS)was taking over directly Petitioner' s case because of the credible allegations of IRS employees misconduct. In the affidavit Petitioner stated that, "[i]t is my honest and good faith belief and intent to submit to the Ohio Department of Taxation any and all appropriate forms which are identified as required by law to submit". And Petitioner further explained that according to the IRS Petitioner was to take no further action until resolution occurred with the IRS. As of this date resolution regarding the same years and issues of this writ has not occurred.

On or about May 1, 2004 Petitioner mailed his Return/AFFIDAVIT STATEMENT (herein after will be referred to as "RETURN") for year 1996 to Mr. Mark W. Everson, Commissioner of Internal Revenue which was received and accepted . Item 12 of the RETURN stated that Petitioner revoked and amended by replacement with RETURN any previous returns filed.

The record reflects that Petitioner was in continual communication with the Ohio Department of Taxation during the time period germane to this case. Since Petitioner did not seek return of monies from Ohio that resulted from filing his RETURN as explained above, no document was required to be filed with the Ohio Department of Taxation.

On or about December 12, 2005 Petitioner received a Notice of Assessment from the Tax Commissioner of Ohio. During a telephone conversation on December 20, 2005 with Agent Lana No. 4039, Petitioner was told that the Notice of Assessment would be put on hold pending the outcome of related issues with the Internal Revenue Service.

Because no written confirmation was received that the Notice of Assessment was put on hold, Petitioner submitted without prejudice his Petition For Reassessment, dated February 7, 2006, to preserve any and all rights pursuant to, which includes but is not limited to the United States Constitution, Federal Law, the Uniform Commercial Code, the Ohio Constitution, and Ohio Law. In his PETITION, Petitioner requested a hearing and explained that issues were still pending in the Appeals Division of the IRS. No hearing or meeting took place

On or about March 23, 2006 Petitioner received correspondence from the Ohio Department of Taxation Administrative Review Section which explained that "Your Petition for Reassessment has

been referred to our Administrative Review Section for consideration. You will be contacted by an agent when your count is assigned". No agent ever contacted Petitioner.

On March 30, 2006 Case No: 1:06-cv-00726, *Carl R. Wagenknecht Jr. vs Internal Revenue Service, Commissioner of Internal Revenue Service, and Lawrence Phillips* was filed in the U.S. District Court , Northern District of Ohio. On March 31, 2006, *Carl Robert Wagenknecht Jr. vs. Commissioner of Internal Revenue* was filed in the United States Tax Court., Docket No: 6315-06 and then appealed to the United States Court of Appeals for the Sixth Circuit, as Case No: 08-2456 which is still active. Both lawsuits are regarding an alleged federal tax liability for 1996 which encompasses the same issues and year pertaining to this writ.

The District Court dismissed Case No. 1:06 CV 0726 sua sponte . Petitioner appealed the case to the United States Court of Appeals for the Sixth Circuit. The Appeals Court remanded the case back to district court for further proceedings. See *Wagenknecht v. United States*, 533 F.3d 412(6th Cir. 2008) . On February 12, 2009 the ORDER OF DISMISSAL and JUDGMENT ENTRY in Case No: 1:06 CV 726 was filed in the United States District Court of Ohio , Northern District of Ohio , Eastern Division by the Honorable Judge John Adams. Judgment was entered in favor of Petitioner Carl R. Wagenknecht Jr.

On or about June 7, 2006 Petitioner Carl R. Wagenknecht Jr. received the Ohio Tax Commissioner's FINAL DETERMINATION dated May 19, 2006 which alleged the Tax Commissioner had no jurisdiction.(Appendix pps.68-70) Petitioner timely flied a notice of appeal with the Board of Tax Appeals on August 3, 2006, Case No: 2006-T-1007. According to ORC 5747.13 no payment of any alleged amount owed was required to be paid with the Petition for Reassessment.

On December 21, 2007 the Ohio Board of Tax Appeals entered its Decision and Order granting the Tax Commissioner's motion to affirm his final determination because the Board of Tax Appeals lacked jurisdiction.(Appendix pps.62-67). On January 24, 2008, Petitioner's Notice of Appeal was timely filed with the Supreme Court of Ohio.

The Judgment Entry and the Opinion of the Supreme Court of Ohio were each entered on December 31, 2008.(Appendix pps.49-61) A timely Motion For Reconsideration was filed on January 12, 2009 and was denied on March 4, 2009. (Appendix pps.37-48)

This petition for writ of certiorari is timely filed pursuant Rule 13(1) &13(3) of the Rules of the Supreme Court of the United States.

"It is a basic principle of statutory construction that courts have no right first to determine the legislative intent of a statute and then, under the guise of its interpretation, proceed to either add words to or eliminate words from the statute's language. *Water Quality Ass.' v. United*

States, 795 F.2d 1303 , 1309(7th Cr. 1986) But this is precisely what the Supreme Court of Ohio did.

The Supreme Court of Ohio affirmed the Ohio Board of Tax Appeals(BTA) and the Ohio Tax Commissioner assertion that it is mandatory that Ohio Citizens file FORM 1040 with the Internal Revenue Service(IRS) as a requirement to file Ohio FORM IT-1040 even though the Ohio Supreme Court was provided with Court documents(exhibits attached to the Motion for Reconsideration) where the Commissioner of Internal Revenue admitted through counsel that Petitioner (and other similarly situated Citizens) was not required to file FORM 1040.

And further, the Ohio Supreme Court held that the Ohio Tax Commissioner is not required to verify that the Citizen is a "person" "liable" for federal income tax pursuant to the Internal Revenue Code (IRC) and cite the specific statute making the Citizen liable. Furthermore, the Ohio Tax Commissioner is not required to verify if the information received from the IRS used as the basis to allege a state tax liability is accurate, correct, credible, reliable, and/or obtained within the statute of limitations.

The Supreme Court of Ohio's decision which is the subject of this writ had to hold that the calculations and computations of an IRS Agent established that Petitioner had a federal tax liability and therefore an Ohio Tax Liability. But this is in direct conflict with the holding in *United States v. Taylor* 305 F.2d183, 184 (1962) which held

"mere computations of a revenue agent do not legally determine one's tax liability."

Pursuant to a contractual relationship the Ohio Tax Commissioner (Ohio Department of Taxation) and the IRS work in concert to perpetuate the myth that Ohio Citizens are required to file FORM 1040 so as to extract monies not owed through fear and intimidation.

To ensure that a Citizen has no forum to dispute the assertions referenced above the Citizen must (1) file a document that is not required and/or prohibited by law to file and/or (2) pay any alleged monies owed for the Ohio Tax Commissioner to hear the Citizens plea.

The Supreme Court of Ohio's decision in this case is in conflict with the holdings in the following cases which includes but is not limited to : (1) *Botta v. Scanlon,* 288 F.2d 504 (1961) (2) *United States v. Taylor* 305 F.2d 183 (1962); (3) *Farrington v. Tennessee,* 95 U.S. 679(1877); (4) *Garner v. United States,* 424 U.S. 648 (1976); (5) *Vlandis v. Kline,* 412 U.S. 441 (1973); (6) *Armstrong v. Manzo,* 380 U.S. 545 (1965); (7) *Escobedo v. Illnois,* 378 U.S. 478 (1964); (8) *Joint Anti-Fascist Comm. V Mc Grath,* 341 U.S. 123 (1951).; (9) *Heiner v. Donnan,* 285 U.S. 312 (1932); as well as being in conflict with and repugnant to the Constitution of the United States of America and the Constitution of the State of Ohio.

Now is the time for the United States Supreme Court to provide guidance. This case is timely and provides the rare opportunity to provide

that guidance. There is not one segment of America that does not agree that the IRS is out of control as well as state and local taxing authorities, trampling on the rights of the Citizens of the United States of America. United States Senators, United States Representatives, the Executive Branch, state politicians, and every day Citizens cry for Tax Reform.

REASONS FOR GRANTING THE WRIT

A. The State of Ohio contracted away Ohio Citizens guaranteed constitutional rights.

The State of Ohio which includes the Ohio Department of Taxation and the Tax Commissioner of Ohio entered into a contractual relationship with the Internal Revenue Service (IRS) whereby the IRS provided information to the Ohio Department of Taxation and/or the Tax Commissioner of Ohio. The information obtained pursuant to said contractual relationship was accepted as indisputable fact. The contractual relationship dictates the terms and conditions by which Ohio Citizens are permitted to interact with state and federal governments regarding tax issues.

A direct result of said contractual relationship is that Ohio Citizens have no recourse as a third party beneficiary to the contract between the State of Ohio and the IRS. Hence, the State of Ohio by and through elected officials and state employees (i.e. Ohio Tax Commissioner) have no responsibility or accountability to its Citizens.

In addition, The Supreme Court of Ohio's decision in this case held that the State of Ohio which includes the Ohio Department of Taxation and the Tax Commissioner of Ohio can enter into a contractual relationship with the IRS that contracts away Ohio Citizens' guaranteed rights according to the Constitution of the United States of America and the Constitution of the State of Ohio which includes but is not limited to due process of law.

And further, the Supreme Court of Ohio's holding puts an Ohio Citizen in the precarious position of having to violate both federal as well as State law and/or making payment of an alleged tax owed as a condition precedent for the Tax Commissioner of Ohio to have jurisdiction to hear from an Ohio Citizen that the information received from the IRS pursuant to the contractual relationship is not credible, reliable, accurate, correct, truthful and/or that the information was obtained after the statute of limitations expired. Moreover, the Ohio Tax Commissioner can deny an Ohio Citizen the opportunity to present any evidence or testimony to dispute the information received from the IRS unless the Ohio Citizen complies with the Tax Commissioner's preconditions.

The constitutional rights the State of Ohio contracted away are explained more fully below.

B. An Ohio Citizen has the constitutional right to present evidence and

testimony that information received from the IRS is not accurate, not truthful, not reliable, not correct and/or obtained after the statute of limitations expired

Whether revenue or economic activity of any kind has been received or engaged in; and, if so, whether such revenue or activity was of a taxable character; is established in whole or in part by testimony. See *Bothke v. Fluor Engineers and Construction, Inc. et al*, 713 F.2d 1405, 1414 (1983). Petitioner's absolute right to testify regarding such testimony is beyond rational question or dispute.(See *Garner v. United States*, 424 U.S. 648 (1976); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Escobedo v. Illnois*, 378 U.S. 478 (1964); *Joint Anti-Fascist Comm. v Mc Grath*, 341 U.S. 123 (1951).)

In *Heiner v. Donnan*, 285 U.S. 312 ,325 (1932) the Court held that:

> " The *Schlesinger* case has since been applied many times by the lower federal court, by the Board of Tax Appeals, and by state courts,*and none of them seem to have been at any loss to understand the basis of the decision , namely, that a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment"

And the Supreme Court further held that the restraint imposed upon legislation by the due

process clause of the Fourteenth Amendment and the Fifth Amendment is the same. *id* at 326

If one believes the information the Ohio Department of Taxation received from the IRS pursuant to their contractual relationship is incorrect, then one is required to provide a copy of their MFTRAX transcript which is a selected portion of their entire Individual Master File(IMF) created by the IRS. The Ohio Department of Taxation accepts the information as correct and requires the one who disputes the information to seek resolution with the IRS.

The only legal remedy to overcome this presumption of correctness regarding the information received from the IRS is the rebuttal of of said information by way of Petitioner's own testimony and supporting evidence as to his own knowledge, information, and belief. There must be provided an opportunity to present such evidence and testimony. This is the essence of due process, that no American (i.e. Petitioner) can lawfully be prevented from testifying in his or her own behalf.

But that is precisely what has happened in this case. The Ohio Department of Taxation provides no means for one to provide evidence and testimony that establishes the information received from the IRS was not correct, not reliable, not credible, not truthful and/or obtained after the statute of limitation expired.

The Ohio Department of Taxation's position is that if the Ohio Citizen claims the information received from the IRS is in error, the Citizen must

deal directly with the IRS to correct the error. To make an analogy, this would be as if a merchant (IRS) makes an unauthorized charge on your(Ohio Citizen) alleged credit card and when you contact the credit card company (Ohio Tax Commissioner) to dispute the charge you are informed that to dispute the charge , no matter if you can establish the charge was unauthorized , you never made the purchase, and/or you don't have an account with the credit card company (Ohio Tax Commissioner), you must pay the entire amount charged then the credit card company(Ohio Tax Commissioner) **may** consider the dispute. Otherwise you are required to settle the dispute directly with the merchant (IRS)

The bottom line is this. What if the amount alleged owed to the Internal Revenue Service by an Ohio Citizen is incorrect, as a result of error. And what if that error was so outrageously incorrect, it was for millions of dollars. Would this Court require the millions of dollars be paid before allowing one of your Citizens a voice, an opportunity for correction, an opportunity for due process? The Ohio Supreme Court's response is yes!

But this position is contrary to Courts ruling in *Beaty v. United States*, 937 F.2d. 288, 293 (6th Cir. 1991) which held that:

> "A Central tenet of our republic- a characteristic that separates us from totalitarian regimes throughout the world-is that the government and private citizens

> resolve disputes on an equal playing field in the courts. When citizens face the government in the federal courts[and state courts], the job of the judge is to apply the law, not bolster the government's case"

But that is precisely what the Supreme Court of Ohio did. The Ohio Supreme Court not only bolstered the state and federal government's case, but became their advocates.

The Ohio Supreme Court accepted as indisputable fact the validity of the IRS assessment as "finally determined" that the Ohio Tax Commissioner made reliance on. (Appendix pps.42-43) The Supreme Court of Ohio disingenuously stated that "Wagenknecht had never proposed to show that the act of assessment occurred. (Appendixp.44) The IRS manufactured an assessment that was not accurate or valid. The Ohio Supreme Court ruled that an Ohio Citizen(i.e. Petitioner) has no right to give evidence and/or testimony to demonstrate that the information received from the IRS was not valid, not accurate, not reliable, not correct, not truthful, and/or obtained after the statue of limitations..

C. To require an Ohio Citizen to pay an access fee to seek relief for tax laws in the legal process is unconstitutional.

The Ohio Supreme Court held that Ohio Citizens are required to pay a specified amount of

money (similar to a poll tax hereinafter called an "access fee") before the Citizen can have access to the Ohio Judiciary to seek relief for damages resulting from the contractual relationship between the IRS and the State of Ohio. In this case the Supreme Court of Ohio held that Ohio Citizens cannot even challenge the jurisdiction or the information received from the IRS unless they pay the "access fee".

Such holding violates the Fifth Amendment of the United States Constitution and Article I ¶ 16 of the Ohio Constitution. "The Constitution of Ohio guarantees that the courts of Ohio "must be open, and each person must have a remedy by due course of law. Ohio Constitution, Section 16, Article I" *State v. Bob Manashain Painting,* 121 Ohio. Misc.2d. 99, 106, 2002-Ohio-7444 .

The Ohio Supreme Court's holding is a Catch-22 not only for Petitioner but for all Citizens in like or similar situation. To be heard before the Ohio BTA a Citizen must complete an amended return under penalty of perjury that the Citizen agrees with any alleged findings of the Internal Revenue Service. Then and only then can the Citizen argue that the information from the Internal Revenue Service contained on the amended return, which had to be executed under penalty of perjury was not accurate, not reliable, not credible, not correct , not truthful and /or acquired after the statute of limitations expired. And further, to argue whether the Citizen,(i.e. Petitioner), was not required to file Form 1040

which impacts the filing of Ohio's Form. Such action could expose this Citizen or others to a potential violation of perjury laws.

In addition, the Court's holding requires prepayment and fails to consider that the information from the Internal Revenue Service may indeed, be incorrect, not valid regardless of the amount alleged owed. The public, Congress, the Inspector General and other oversight agencies are fully aware of the irregularity within the IRS, including but not limited to error due to accounting, transcripts and master files which in some cases are resultant from employee error or the grossly outdated computer systems & programs being utilized by the Internal Revenue Service. And, in some cases disgruntled and vindictive employees.

The Supreme Court of Ohio initially held that "If Wagenknecht had filed the amended return but withheld payment, he could have pursued his petition for reassessment on the merits without prepaying". (Appendix p. 58) However, the required Amended Return used for 1996 was Form IT-1040 that the tax preparer would mark as an amended return. After much research and discussion with tax preparers, tax consultants and employees of the Ohio State Tax Commissioner, it was determined that, the State of Ohio and the Ohio Tax Commissioner failed to publish or identify a Form for use for Citizens who for whatever reason, are not required or prohibited from filing Internal Revenue Service Form 1040.

Petitioner has never refused to file an appropriate form required by law. The Ohio Tax Commissioner has not provided any form or procedure to follow if the Ohio Citizen alleges that he is not required and/or prohibited to file FORM 1040. Petitioner stated that he is not required to and prohibited by law from filing Form 1040 which results in Petitioner not being able to file Ohio Form IT-1040. If Petitioner filed Form IT-1040 he would be forced to violate both federal and state law.

The Ohio Supreme Court further stated that "Wagenknecht overlooks the possibility of filing correspondence along with the return that could express his reservations about the federal assessment".(Appendix p.45,57-58) When a Citizen completes a return which is signed under penalty of perjury, the Citizen in essence is stipulating to the truthfulness of the information contained on the return. Hence, extraneous correspondence would be of no legal effect. Furthermore. modification to the return and/or including attachments to the return could make the return invalid.

D. Ohio Tax Liability and Federal Tax Liability are mutually exclusive and therefore must be established independently.

The Supreme Court of Ohio's decision in essence overturned the United States Supreme Court holding in *Farrington v. Tennessee*, 95 U.S. 679(1877) that made it clear that the mutually

exclusive nature of sovereignty, and the power to tax according to *McCulloch v. Maryland*, 17 U.S. 316 (1819) was reciprocal, holding that where the State governs, *it is as though the federal government does not exist*. (emphasis added) Thus any alleged federal tax liability was distinct and separate from any alleged Ohio State tax liability.

The State of Ohio has chosen to use a person's alleged status as a taxpayer pursuant to the Internal Revenue Code with an alleged federal tax liability as the measuring instrument in determining a person's Ohio State tax liability. *Dery v. Lindley*(1979), 57 Ohio St.2d 5.

The Tax Commissioner of Ohio lacks standing to claim federal jurisdiction over a Citizen of Ohio for tax purposes. Using the federal income tax standard pursuant to the Internal Revenue Code as the measuring standard for Ohio Tax liability does not in and of itself invoke IRS [federal] jurisdiction. If a person does not have a federal tax liability then a person has no Ohio tax liability. Petitioner had no federal tax liability and therefore no Ohio tax liability according to said measuring standard.

However, an Ohio tax liability is not precluded if a different measuring instrument had been used. Had the Ohio Tax Commissioner used some other measuring instrument or standard, the Tax Commissioner may have established that Petitioner had an Ohio Tax liability according to said measuring instrument.

E. The Ohio Tax Commissioner is required to verify that a Citizen of Ohio is a "person" "liable" for an income tax pursuant to the Internal Revenue Code before the Ohio Tax Commissioner can claim the Ohio Citizen has a state tax liability based upon the alleged federal tax liability.

26 USC 7701 (a) (14) states that the term "taxpayer" means any "person" subject to any internal revenue tax. However, a "person" must be "liable" for a tax before a "person" is classified as a "tax payer". Furthermore, the Appeals Court in *United States v. Taylor* 305 F.2d 183, 184 (1962) held that "mere computations of a revenue agent do not legally determine one's tax liability." Specifically, the Appeals Court in *Botta v. Scanlon*, 288 F.2d 504, 508 (1961), held that :

> "...[A] reasonable construction of the taxing statutes does not include vesting any tax official with the absolute power of assessment against individuals not specified in the statutes as persons liable for the tax without an opportunity for judicial review of this status before the appellation of "taxpayer" is bestowed upon them...."

In this case the Supreme Court of Ohio held the opposite of the holdings in *Botta*, supra and *Taylor*, supra. The Supreme Court of Ohio in affirming the Board of Tax Appeals decision stated axiomatically and not subject to dispute that

Petitioner was classified as a "person" "liable" for an alleged income tax without requiring Respondent to verify that Petitioner was a "person" "liable" for a tax according to the IRC.

And further held that the Ohio Tax Commissioner can rely on unverified information received from the Commissioner of Internal Revenue such as a Revenue Agent's calculation to establish an alleged tax liability .

The Supreme Court of Ohio's decision is predicated on the unsubstantiated presumptive leap that Petitioner is a "person" "liable" for an alleged income tax pursuant to the Internal Revenue Code. The Supreme Court of Ohio declared that Wagenknecht never filed an Amended Return Form IT-1040 for 1996. The Supreme Court of Ohio proceeded as if they had established that Petitioner was a "person" "liable" for an income tax pursuant to the Internal Revenue Code and thereby Petitioner was required to file Form 1040 and Form IT-1040.

In *W. Union v. Brodt*, 171 Ohio App.3d 434 , 2007-Ohio-2742, the parties disagreed on the meaning of the word "person" as defined by the municipal income tax ordinance. Brodt, a bank CEO, maintained that "person" meant "employer" whereas the Village claimed "person" meant "an Officer of the Corporation". The Village did not present any evidence that the bank was a corporation defined under the ordinance. The appeals Court held that the village failed to meet its burden that the bank was a "corporation" and

that Brodt was an "employer". Hence, there was insufficient evidence to support the Village's claims.

Likewise, in this case, the burden is with the Ohio Tax Commissioner to establish that Carl R. Wagenknecht Jr. had a Federal Tax Liability as defined in the Internal Revenue Code. The Ohio Tax Commissioner has failed to present any evidence that established Petitioner as a "person," "liable" for an "internal revenue tax". Moreover, the Ohio Tax Commissioner lacks standing to claim an Ohio Citizen had a Federal Tax liability .

The Internal Revenue Service is never required to: (1) prove that the individual is a "person" "liable" for an alleged income tax pursuant to the Internal Revenue Code; (2) prove and establish what statute specifically identifies the individual as a "person" "liable" for an alleged tax pursuant to the Internal Revenue Code; and (3) prove that an individual is required to complete and file Form 1040.

But this is precisely how the Internal Revenue Service operates, declare an individual is a "person" "liable" for an alleged income tax pursuant to the Internal Revenue Code without supporting facts or documentation and proceed as if the jurisdiction is established over the individual. Then if the individual tries to dispute the Internal Revenue Service's allegation, the Internal Revenue Service declares without proof that the individuals arguments are frivolous and without merit. Then to

insure a court is inflamed and bias declares that the arguments are "tax protest-type arguments".

Hence, the Internal Revenue Service is allowed to usurp constitutional rights reserved to the people and several States pursuant to the Tenth Amendment which includes but is not limited to establishing jurisdiction. Also, the Internal Revenue Service is permitted to trample the rights of Citizens pursuant to the Fifth Amendment which includes but is not limited to due process of law.

The United States Supreme Court must hold the Internal Revenue Service accountable to the Citizens of the United States of America and that the Internal Revenue Service is not only required but it is mandatory that an allegation made by the Internal Revenue Service regarding a federal tax liability must be established with supporting documentation and with the specific statute alleging the tax liability. And further; to allow an individual an opportunity to challenge such allegation before a state(i.e Ohio) takes any action based upon the disputed information received form the Internal Revenue Service.

F. The State of Ohio mandates that all Ohio Citizens are required to file Form 1040 is unconstitutional.

The Supreme Court Of Ohio further held that it is mandatory that all Ohio Citizens file Form 1040 with the IRS whether or not the Ohio Citizen is required or prohibited by law to file Form

1040 as a prerequisite to file Ohio Form IT-1040 or Ohio Form IT-1040X(amended return). However, ORC 5747.08(E) states in pertinent part "If either spouse is not required to file a federal income tax return..." Hence, the Ohio Revised Code confirms that not all Citizens of Ohio are required to file a federal tax return (i.e. Form 1040).

A United States Tax Court proceeding provided the forum for Judge Juan Vasquez and Attorneys representing the Commissioner of Internal Revenue to openly admit on the record, that Petitioner(Carl R. Wagenknecht Jr. (as well as other Citizens similarly situated) is not required to file Form 1040.[1] Yet, through fear and intimidation the Internal Revenue Service in collusion with state governments perpetuates the myth that all people are required to file Form 1040. The federal government permits the IRS to perpetuate this myth to the several states claiming that all Citizens of the several states (i.e. Ohio) are required to file Form 1040.

Attached as an exhibit to Petitioner's Motion For Reconsideration was selected portions of the trial transcript from *Wagenknecht v. CIR*, Docket No. 8293-07, where the Tax Commissioner of

---

[1] Attorney Katherine Kosar, counsel for the Commissioner of Internal Revenue, admitted at trial that Carl Wagenknecht who was an Asst. Principal with the Akron Public Schools in Ohio was not required to file Form 1040 . See Trial Transcript Docket No: 8293-07 p. 9 ll 19-20 Also, Judge Juan F. Vasquez acknowledged that circumstances exist where people are not required to use Form 1040. id. P. 21 ll 11-12

Internal Revenue admitted , by and through counsel, that Petitioner is not required to file Form 1040,(See footnote 1) Still, The Supreme Court of Ohio denied the motion.

The Tax Commissioner also filed a Motion for Reconsideration and/or Clarification and argued that the Ohio Supreme must remove paragraph 16 because allegedly Petitioner did not file an amended return required by law [Form IT-1040] and therefore "was jurisdictionally barred from seeking review of his Ohio adjusted gross income until he submitted payment with the filing of petition of reassessment under R.C. 5747.13(E)(2)".

Yearly the Internal Revenue Service sends notice to the people of the United States of America that the U.S. Federal Income Tax is a system of voluntary assessment and voluntary compliance despite the common mistaken belief fostered by deceptive advertising promulgated by the IRS falsely alleging to the effect, in substance, that every person in the private sector in the United States of America must pay U.S. Federal Income Tax as a requirement of law.

The IRS makes every effort to encourage unnecessary voluntary assessment and voluntary compliance by supplying millions of copies of IRS Forms (i.e. Form 1040) and Instruction Booklets to people who are not liable to make and deliver such forms or pay any U.S. Federal Income Tax, while obscuring and suppressing the information that would cause such people to understand that they are not liable for said tax.

Likewise, the Ohio Department of Taxation will each year send notice to the Citizens of Ohio that it is mandatory that each Ohio Citizen file Form IT-1040 . According to Ohio Form IT-1040 a prerequisite to determine Ohio taxable Income is to establish the applicable Federal adjusted Gross Income from Form 1040. The Ohio Department of Taxation and the Ohio Tax Commissioner perpetuates this common mistaken belief fostered by deceptive advertising promulgated by the IRS and the Ohio Department of Taxation falsely alleging to the effect, in substance, that every person in the private sector in the United States of America must pay U.S. Federal Income Tax as a requirement of law and file Form 1040.

Petitioner's alleged federal tax liability, just like the majority of Americans' alleged federal tax liability, is based upon the unsubstantiated legal argument that it is mandatory that all people (i.e. Petitioner) are required to file Form 1040. People who are required to file Form 1040 are "persons" "liable" for a specific tax pursuant to the Internal Revenue Code.

The Courts, state Department of Taxations , , and the legal establishment are the means that perpetuate this fraud on America. As in this case, the Supreme Court of Ohio upheld the decision that the Board of Tax Appeals could deny an Ohio Citizen(i.e. Petitioner) a hearing to establish (1) that the Citizen was not required to file Form 1040 and therefore could not complete and file Ohio FormIT-1040 and (2) that the Ohio Citizen was not

required to prepay an "access fee" to dispute information received from the Internal Revenue Service pursuant to a contractual relationship which alleged that the Ohio Citizen had Federal Adjusted Gross Income.

G. According to the Tax Commissioner a completed Form IT-1040 is a condition precedent to determine an Ohio Citizen's state tax liability.

The Tax Commissioner of Ohio begins with the premise that it is mandatory for Citizens of Ohio to file Form 1040 U.S. INDIVIDUAL INCOME TAX RETURN. The Ohio form required to be filed is FORM IT-1040. (Note: for 1996 an amended return was the Form IT-1040 with the caption, Amended Return, written on it). The information placed on the Ohio Form IT-1040 must be identical to the Federal Form 1040, for example AGI. It is prima facie evidence that if a Citizen is required to file Form 1040 then said Citizen had an income tax liability pursuant to the Internal Revenue Code. As such one could conclude that if the IRS alleges that the AGI has been changed that such action would be valid.

The Commissioner of Internal Revenue, by and through counsel, admitted on the record in United States Tax Court , Docket No. 8293-07 , that Petitioner Carl R. Wagenknecht Jr. is not required to file Form 1040. The Supreme Court of Ohio has stated that tax ordinances must be strictly construed , and any doubt as to their

meaning must be resolved in favor of the taxpayer. *Roxane Laboratories, Inc. v. Tracy*, 75 Ohio St.3d 125,127. Citing *Gulf Oil Corp. V. Kosydar*(1975), 44 Ohio St.2d 208, paragraph one of the syllabus. Therefore if Petitioner had no federal tax liability then there is no federal adjusted gross income. Hence, there is no response for line 1 of the Ohio Form IT-1040.

As explained above Petitioner has determined that Form 1040 does not have general applicability for the public and therefore is not mandatory to file. Therefore, if Petitioner is not required to file Form 1040 then there is no way to complete an Ohio Form IT-1040. Hence, Ohio Form IT-1040 is not applicable to Petitioner or any other similarly situated Ohio Citizens.

H. The State of Ohio mandates that Petitioner violate 28 USC 1746.

According to 28 USC 1746 a person who is required to sign a document pursuant to 28 USC 1746(2) would be executing the document within the United States and therefore subject to its jurisdiction. For example , a United States Court Reporter must complete Form AO 40B (REV.7/91) titled STATEMENT OF EARNINGS OF UNITED STATES COURT REPORTERS and sign and date "CERTIFICATION BY COURT REPORTER: By signing this form, I certify under penalty of perjury pursuant to 28 USC 1746 that the foregoing is true and correct". Likewise, a person who is required to complete Form 1040 titled U.S. Individual Income

Tax Return must sign Form 1040 "Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements , and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer(other that taxpayer) is based on all information of which preparer has any knowledge".

According to 28 USC 1746(1) a person who is required to sign a document pursuant to 28 USC 1746(1) would be executing the document without the United States and therefore not subject to its jurisdiction. Petitioner was required to complete a separate Form AO 440 (Rev.10/93) titled SUMMONS IN A CIVIL CASE in case 1:06 CV 2510 for each of the following: (1) Internal Revenue Agent Maureen Lippert; 2) U.S. Attorney General ; and (3) Internal Revenue Service. Petitioner was required to sign each of the before mentioned Form AO 440 under DECLARATION OF SERVER as follows: "I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct."

Petitioner was in Akron, Ohio when the documents were executed. To reconcile the manner in which Petitioner was required to sign, one must look to jurisdiction. A person such as Petitioner who is required to sign pursuant to 28 USC 1746(1) is not a federal employee and therefore is not under the jurisdiction of the United States as specially

defined in the Internal Revenue Code and therefore not under the jurisdiction of the IRS.

Furthermore , 26 USC 6061(a) states that "Except as otherwise provided by subsection (b) and sections 6062 and 6063 , any return , statement , or other document required to be made under any provision of the internal revenue laws or regulation shall be signed in accordance with forms or regulations prescribed by the Secretary." 26 USC 6065 further requires that "Except as otherwise provided by the Secretary , any return , declaration , statement , or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that is made under the penalties of perjury." Hence, Petitioner would violate federal law if he completed and signed Form 1040 to comply with Ohio law.

I. The State of Ohio mandates that Petitioner violate ORC 5703.25 and ORC 5703.26 to complete and file Form IT-1040.

Petitioner is prohibited according to 28 USC 1746 of signing any alleged tax return as required by ORC 5703.25 for the Ohio Department of Taxation . Furthermore, ORC 5703.26 prohibits one from knowingly making a false or fraudulent return or document

Petitioner knows that Form 1040 is for use by federal employees not the general public. Likewise, Form IT-1040 is not applicable to Petitioner. Hence, if Petitioner would complete the

before mentioned forms he would be in violation of ORC 5703.26. Therefore, the Ohio Tax Commissioner was incorrect when he stated that "the petitioner[Carl R. Wagenknecht Jr.] failed to file the required Ohio Personal income tax return".

It is undisputed that Petitioner filed Form IT-1040 Ohio Income Tax Return for year 1996 on October 15, 1997. Petitioner filed said Form IT-1040 as he understood the applicability of the Internal Revenue Code to himself in 1997. Subsequent research revealed that Petitioner erred when he filed Form 1040 and Form IT-1040 for year 1996.

Petitioner having reserved without prejudice his rights pursuant to UCC 1-207 revoked in 1998 his "signatures on previously filed W-4, 1040 Forms, and State Income Tax Forms[Ohio IT-1040]." Then in April 2000 Petitioner filed with the Ohio Department of Taxation an affidavit that included a statement of his "intent to submit to the Ohio Department of Taxation any and all appropriate forms which are identified as required by law to submit".

Finding no identified form that is mandatory to complete and Petitioner desired to be in compliance with applicable law, Petitioner sought to prepare in the alternative a return/statement that complied with 26 USC 6011. However, the Internal Revenue Code, which liberally uses the concept of returns, does not formally define "return". *United States of America v. Hindenlang,,* 164 F.3d 1029 (6th Cir. 1999). Case law provides

the requirements for a document to be considered a valid return.

The Appeals Court *In re Payne,* 430 F.3d 1055, 1057 (7th Cir. 2005) held that for a document filed with the IRS to be deemed a return, the document must (1) purport to be a return (2) be signed under penalty of perjury (3) contain enough information to enable the taxpayer's tax liability to be calculated and (4) an honest and reasonable endeavor to satisfy the law. (*See Watson v. Commissioner of Internal Revenue* T.C. Memo. 2007-146 (2007).

In addition, the Appeals Court in *United States of America v. Hindenlang,* 164 F.3d 1029,1033 (6th Cir. 1999) held that " the Internal Revenue Code does not specifically set out how accurate, thorough, or complete the requisite form must be in order to qualify as a return under the many sections of the Code". The RETURN met the requirements of a valid return according to the *Payne* case, *supra.*

Petitioner in May 2004 filed RETURN pursuant to 26 USC 6011 for year 1996 that superseded any prior filings with the Internal Revenue Service. Petitioner alleged in the RETURN that based upon an extensive legal analysis that he had no tax liability and the Internal Revenue Service lacked jurisdiction. When there is no federal tax liability then there is no filing requirement for both Ohio and the Internal Revenue Service

All of the above referenced actions occurred prior to the date of issuance of the assessment by the Ohio Department of Taxation. The RETURN was filed with both the Tax Commissioner of Internal Revenue and Secretary of the Treasury Department.

According to IRM 20.1.1.2.1(6) compliance is achieved when a taxpayer makes a good faith effort to meet the tax obligation defined by the Internal Revenue Code. Therefore, for Tax Year 1996 Petitioner was in compliance with IRC 6011 and applicable Ohio law.

J. The Ohio Tax Commissioner demands that an Ohio Citizen make payment of an alleged tax owed and/or demands that an Ohio Citizen file a form(i.e. FORM 1040, IT-1040) that the Citizen is not required and/or prohibited by law to file as a condition precedent for the Tax Commissioner to have jurisdiction.

The Tax Commissioner erred when the Tax Commissioner stated in his Final Determination that "there is no jurisdiction to consider the petition since "the petitioner failed to make the required payment on the assessment when submitting the petition for reassessment " because Petitioner was not required to make payment pursuant to ORC 5747.13 as further explained in the instruction as provided with Form titled Petition for Reassessment. Petitioner was classified

under ORC 5747.13(E)(8). (see no. 4 under Payment Requirements of instructions)

According to the instructions accompanying the Notice of Assessment under PAYMENT REQUIREMENTS it states :

"PAYMENT REQUIREMENTS

To file a Petition for Reassessment, certain payments must be made, *but only* in the following situations:

Payment requirements for filing a Petition for Reassessment are as follows:

1. If you are only objecting to the assessment of penalty and/or interest, full payment of the assessed tax and interest is required. The penalty does not have to be paid at this time, but must be paid if the appeal is unsuccessful.

2. If the assessment was issued because you failed to file the annual report or any amended returns *required by law* for the given tax period, you must pay all of the tax and interest that was assessed. The penalty does not have to be paid at this time, but must be paid if the appeal is unsuccessful.

3. If this assessment was issued because you did not pay the entire tax shown on the reports you filed, you must pay the unpaid balance of the tax shown on the report(s) and any interest.

No payment is required if none of the conditions outlined in 1 to 3, above, apply."(emphasis added)

The instructions referenced above were prepared and provided to Petitioner by the Tax Commissioner of Ohio. Said document can be considered a government pamphlet and therefore a party admission. *U.S. v. Van Griffin,* 874 F.2d 634 (9th Cir. 1989). Hence, the Ohio Tax Commissioner has admitted that there are situations "where no payment is required if none of the conditions outlined in 1 to 3, above, apply". The facts of this case establish that this is a such a situation where the conditions in 1 to 3 do not apply.

Number 1 did not apply because Petitioner objected to the TOTAL DUE which included TAX DUE AMOUNT, ASSESSMENT INTEREST and LATE FILING PENALTY. Likewise, Number 2 did not apply because Petitioner filed any required return that was applicable for 1996. Also, Number 3 does not apply because Petitioner paid the entire tax amount shown due on any reports Petitioner filed . Therefore Number 4 is the only condition that applies. Hence, No Payment was due with the Petition For Reassessment.

The Ohio Tax Commissioner was put on notice with competent, credible evidence that information received from the IRS contained erroneous information that was prepared by IRS employees whose truthfulness and veracity had been put into question. The Ohio Tax

Commissioner ignored the information provided by Petitioner.

Regardless of the documentation provided the Ohio Tax Commissioner declared that Petitioner(and any other Ohio Citizen similarly situated) must pay any alleged tax owed and/or file an alleged required return regardless of what the facts are.

K. ORC 5747.10 and ORC 5747.13 are unconstitutional as applied.

The Ohio Supreme Court acknowledged in its initial Slip Opinion that an Ohio Citizen must be afforded an opportunity to assert his claim that the IRS assessment was wrong without having to prepay. The Ohio Supreme Court held at paragraph 16 of the slip opinion that:

> "{16} Moreover, filing the amended return without payment would not have precluded Wagenknecht from asserting his claim that the federal assessment is substantively wrong. If Wagenknecht had filed the amended return but withheld payment , he could have pursued his petition for reassessment on the merits without pay". (Appendix p.58)

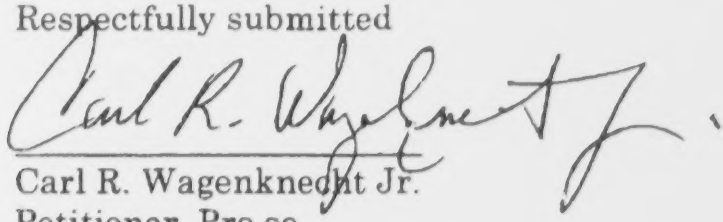
The Ohio Supreme Court acquiesced to the Ohio Tax Commissioner's Motion for Reconsideration or Clarification and removed paragraph 16 from the Court's final opinion. The

end result is that the Ohio Supreme Court decision regarding ORC 5747.10 and ORC 5747.13 eliminates any avenue for an Ohio Citizen to challenge the validity of an alleged IRS assessment and/or whether or not the Citizen is required to file FORM 1040 without payment of any alleged monies owed. Hence, Petitioner was denied any means to present evidence or testimony. Thus the tax statutes are unconstitutional as applied to the facts. (see *Cleveland Gear Co. v. Limbach*(1988), 35 Ohio St. 3d 229) and (see First and Fifth Articles of Amendment to the United States Constitution; Article I ¶1 and ¶16 of the Constitution of the State of Ohio)

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted



Carl R. Wagenknecht Jr.
Petitioner, Pro se
174 Cheltenham Lane
Munroe Falls, Ohio 44262
Telephone: 330-388-8968

APPENDIX

THE SUPREME COURT OF OHIO

Carl R. Wagenknecht Jr	Case No. 2008-0095
V.	RECONSIDERATION ENTRY
William W. Wilkins [Richard A, Levin], Tax Commissioner of Ohio	BOARD OF TAX APPEALS

It is ordered by the Court that appellant's motion for reconsideration in this case is denied. Upon consideration of appellee's motion for reconsideration or clarification,

The motion for reconsideration or clarification is granted to the following extent :

Paragraph No. 16 appearing in Slip Opinion No. 2008-Ohio-6812 will be deleted from the version of the opinion published in the Ohio Official Reports.

(Board of Tax Appeals; No. 2006T1007)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Filed: March 4, 2009

Wagenknecht, Appellant, v. Levin , Tax Commr, Appellee

[Cite as *Wagenknecht v. Levin*, 121 Ohio St.3d 13, 2008-Ohio-6812.]

R.C. 5747.10 – *Petition for reassessment – Failure to make required payment on the assessment – Board of Tax Appeals' decision affirmed.*

(No.2008-0095 – December 17, 2008 – Decided December 31, 2008)

APPEAL from the Board of Tax Appeals.
No. 2006-T-1007

Per Curiam.

{¶1} Appellant , Carl R. Wagenknecht Jr., contests an assessment of unpaid personal income tax as to the 1996 tax year, which the Tax Commissioner issued against him on December 8, 2005. Wagenknecht initiated the present proceedings by filing a petition for reassessment, dated February 7, 2006. The commissioner's final determination , issued on May 19, 2006, dismissed the petition on jurisdictional grounds. On appeal, the Board of Tax Appeals("BTA") granted the commissioner's motion and summarily affirmed that dismissal. After a careful review of the record

in light of Wagenknecht's arguments, we find no legal error, and we affirm the BTA.

Background

{¶2} This case originates in a redetermination by the Internal Revenue Service("IRS") of Wagenknecht's adjusted gross {"AGI") for 1996. When the IRS makes such an adjustment, R.C. 5747.10 requires an Ohio taxpayer to file an amended Ohio return that incorporates the new AGI figure and computes its effect on the Ohio tax liability for that year. The Tax Commissioner found that Wagenknecht had failed to file the required Ohio personal income tax return and proceeded to compute an Ohio income-tax deficiency based on the new AGI figure. The commissioner also found that "[t]here is no further pending action before the Internal Revenue Service pertaining to this taxpayer for this tax year" and that "[t]he assessment by the Internal Revenue Service has been finally determined." Finally, because Wagenknecht had failed to make the required payment on the assessment as required by R.C. 5747.13(E)(2), the commissioner ruled that he lacked jurisdiction to consider the. petition.

{¶3} Wagenknecht timely filed his notice of appeal at the Board of Tax Appeals on August 3, 2006, asserting among other things that the commissioner had erred by denying jurisdiction under R.C. 5747.13: the applicable division of R.C. 5747.13, according to Wagenknecht, was R.C. 5747.13(E)(8), not R.C. 5747.13(E)(2). Additionally, Wagenknecht contended that the commissioner

had erred by finding that "[t]here is no further pending action before the Internal Revenue Service pertinent to this taxpayer for this tax year" and pointed to two cases, one pending in the United States Tax Court and one in the United States District Court.

{¶4} At the BTA, the commissioner filed a motion to affirm his final determination, which Wagenknecht opposed. Wagenknecht's response reiterated his assertions that R.C. 5747.13(E)(2) with its prepayment requirement did not apply, and he referred once more to two cases pertaining to tax year 1996 that were pending in federal courts. Wagenknecht also filed subpoenas to summon witnesses to a hearing at the BTA and submitted a number of proposed hearing exhibits.

{¶5} On December 21, 2007, the BTA granted the commissioner's motion and affirmed his determination. The BTA found that the exiting record established that the IRS had increased Wagenknecht's 1996 federal AGI by $308,600. Although the adjustments altered his Ohio income tax liability, the BTA found that Wagenknecht had "failed to file an amended return with [the commissioner], as required by R.C. 5747.10," with the result that "payment of the assessment. i.e. the tax and interest, became a condition precedent to Mr. Wagenknecht's ability to have the assessment reviewed" under R.C. 5747.13(E)(2). Because the record showed that Wagenknecht had not paid, the BTA concluded that the commissioner was without jurisdiction to consider Mr. Wagenknecht's petition

for reassessment. By granting the commissioner's motion, the BTA in effect denied Wagenknecht's hearing, even with respect to jurisdictional issues.

{¶6} On appeal to this court, Wagenknecht urges three propositions of law that broadly contest his obligation to file tax returns. Subsumed within the sweep of his arguments is, once again, the contention that the prepayment of the assessment is not required on account of Wagenknecht's having allegedly " filed any required return that is applicable for 1996." Wagenknecht also faults the BTA for denying him a hearing, in particular one devoted to the jurisdictional issues.

{¶7} We hold that the BTA acted reasonably and lawfully when it affirmed the commissioner's dismissal for nonpayment of the assessment. We therefore affirm.

Analysis

I. Wagenknecht failed to file the amended return that Ohio law requires.

{¶8} As we recently discussed in *Gibson v. Levin*, 119 Ohio St. 3d 517, 2008-Ohio-4828, 895 N.E.2d 548, ¶ 2, R.C. 547.13(E)(2) requires prepayment when the taxpayer has not filed an original or an amended return as required by statute. In this case , the BTA affirmed the commissioner, who had issued an assessment based on a federal adjustment to the AGI reported on the 1996 tax return. Although Wagenknecht originally filed an Ohio tax return for 1996, he did not file an amended return after the IRS adjusted the AGI figure. An amended return is specifically

required by R.C. 5474.10 "not later than sixty days after the adjustment has been agreed to or finally determined for federal income tax purposes or any federal income tax deficiency or refund , or the abatement or credit resulting therefrom , has been assessed or paid, whichever occurs first." In a situation such as that presented in this case, therefore, the taxpayer may not rely on the filing of the original return to pursue his petition for reassessment. *Gibson* ¶ 8.

{¶9} In his brief and at his oral argument, Wagenknecht referred to an affidavit he allegedly submitted to the Department of Taxation in April 2000.[1] He suggests that submitting such an affidavit may substitute for the filing of an amended return pursuant to R.C. 5747.10. That is mistaken for one overriding reason. R.C. 5747.10 specifically requires that an amended return be submitted "in such form as the commissioner requires." The affidavit plainly does not equate to the Form IT-1040X, the standard amended return published by the Ohio Department of Taxation, or to any other form prescribed by the commissioner. Accordingly, Wagenknecht did not file an amended return pursuant to R.C. 5747.10.

2. The IRS had "finally determined" Wagenknecht's AGI.

{¶10} The Tax Commissioner's determination recited that the IRS assessment had

---

[1] The document was attached as an exhibit to a brief filed at the BTA but does not constitute a part of the statutory transcript certified by the commissioner to the BTA.

been "finally determined." On appeal of that determination, Wagenknecht had the burden to prove that finding to be clearly unreasonable or unlawful. See *Nusseibeh v. Zaino*, 98 Ohio St.3d. 292, 2003-Ohio-855, 784 N.E.2d. 93. ¶10. The BTA correctly concluded that the taxpayer failed to carry the burden.

{¶11} Before this court, Wagenknecht renews his contention that the federal liability remains in dispute in the two federal cases. That argument fails because recent decisions issued by the federal courts in both cases show that the relevant substantive issue – the amount of Wagenknecht's 1996 AGI - is not, as a matter of federal procedural law, a viable issue in either case. First, Wagenknecht cites case No. 06-00726 in the United States District Court for the Northern District of Ohio. But the United States Court of Appeals for the Sixth Circuit recently affirmed the district court's dismissal of the part of Wagenknecht's complaint that related to the amount of federal tax liability on the grounds that jurisdiction "related to income tax liabilities lies solely in the Tax Court." *Wagenknecht v. United States*(C.A.6, 2008), 533 F.3d 412, 416.

{¶12} As for the Tax Court case, that court decided on July 29, 2008, that the "underlying tax liability" was not properly before the court because of a procedural default by Wagenknecht. *Wagenknecht v. Commr. Of Internal Revenue* (2008), T.C. Memo. 2008-179. Indeed , the tax

court granted complete summary judgment to the government.

{¶13} But even if Wagenknecht could argue that further appeals will vindicate his position, another event triggered the unfilled requirement that he file the amended return under R.C. 5747.10. The commissioner found that the IRS had *assessed* the federal deficiency against Wagenknecht, and Wagenknecht never proposed to show that the act of assessment did not occur.[1] Under R.C. 5747.10, the federal government's act of assessing the deficiency triggers the filing requirement, regardless of the finality of the federal determination.

{¶14} Accordingly, because Wagenknecht was required to file an amended return and failed to do so, he was obligated to prepay the Ohio assessment in order to receive a hearing on his petition for reassessment.

3. The amended-return filing requirement was not unreasonable

{¶15} Wagenknecht also contends that Ohio law should not be construed to require him to file a return declaring, under penalties of perjury, an adjusted tax liability so long as he continues to

---

[1] Indeed, the United States Tax Court stated that the IRS assessed the federal deficiency for 1996 on January 10, 2003. T.C. Memo 2008-179 at 5. Ordinarily, we do not refer to decisions of other courts in collateral cases to determine the operative facts in a case pending before this court. In the present case however, referring to the federal decisions, for the assessment date is not improper , because Wagenknecht places them at issue when he argues that those cases show a continuation of the federal dispute.

dispute it. This argument fails for two reasons. First, Wagenknecht's federal AGI had been "finally determined." So that his personal disagreement with that figure was no longer legally significant. R.C. 5747.10(A) required him to file an Ohio amended return and pay the amount of any deficiency. Second, Wagenknecht overlooks the possibility of filing correspondence along with the return that could express his reservations about the federal assessment.

4. Wagenknecht advances substantive arguments that may not be heard.

{¶16} Wagenknecht asserts that the federal government committed factual and legal errors when it assessed a deficiency against him. His theories include the contention that he is not required to file a federal Form 1040 because of IRS noncompliance with the federal Paperwork Reduction Act and the nonapplicability of Form 1040 to the general public. Additionally, Wagenknecht maintains that the commissioner may not rely on the validity of a federal assessment when he issues an assessment for the failure to pay under R.C. 5747.10(A) – on this view, the commissioner may issue his own assessment only after performing an independent determination of the validity of the federal assessment.

{¶17} These arguments raise challenges to the merits of the assessment. Ordinarily such arguments would be considered and resolved through the petition for reassessment. But Wagenknecht failed to invoke the commissioner's

jurisdiction because he neither filed the amended return nor paid the reassessment.

{¶18} Although Wagenknecht appears to treat his substantive arguments as bearing on the jurisdictional issue, they do not . The substantive arguments contest the *validity of the commissioner's assessment*; they do not , even if meritorious, release Wagenknecht from the duties under R.C. 5747.10 or 5747.13(E)(2) either to have filed the amended return or to pay the assessment in order to receive consideration of his petition for reassessment.

5. Wagenknecht was not entitled to a hearing at the BTA

{¶19} Wagenknecht sought a hearing at the BTA, and in his notice of appeal to the court he stated that the BTA "erred by not allowing Appellant to present evidence at a hearing before the Board (which evidence was proffered in Appellant's Response In Opposition To Appellee's Motion To Affirm The Tax Commissioner's Final Determination) to prove that the Appellant was not required to make payment with the Petition for Reassessment." In *Brown v. Levin*, 119 Ohio St.3d. 335, 2008-Ohio-4081, 894 N.E.2d 35, ¶ 10, we noted that R.C. 5717.02, the statute that governs appeals from determination of the Tax Commissioner, states that "upon the application of any interested party" the BTA "shall order the hearing of additional evidence." We observed that the mandatory language of R.C. 5717.02 implied "as a general matter, that the BTA has no power

analogous to that of a court in a civil action to grant summary judgment under Civ. R. 56 or dismissal for failure to state a claim under Civ.R. 12(B)(6)." Id. ¶11. Against that background, we must address the question whether the BTA could decline to hold a hearing and affirm the dismissal of the petition for reassessment.

{¶20} We hold that the BTA properly issued a summary affirmance. The only legitimate *jurisdictional* issues in the case concerned (1) Wagenknecht's obligation to file an amended return under R.C. 5747.10 and (2) his obligation to prepay under R.C. 5747.13(E)(2). Quite simply the factual proof that Wagenknecht proposed to present at the BTA related to the procedural and substantive validity of the commissioner's assessment , not to the commissioner's jurisdiction to consider the petition. Although Wagenknecht did offer to prove the pendency of the federal cases; he never offered to prove that the federal government and not issued an assessment - an event that by itself triggers the requirement to file the amended return. Nor did he assert that he had in fact paid the assessment. Under these circumstances , the BTA correctly found an absence of jurisdiction as a matter of law. As we have held , a litigant's right to a hearing under R.C. 5717.02 does not encompass a right to present evidence on points that are not jurisdictionally before the BTA. See *Brown*, 119 Ohio St.3d 335, 2008-Ohio-4081, 894 N.E.2d 35, ¶24

Conclusion

{¶21} For all the foregoing reasons the BTA acted reasonably and lawfully when it affirmed the commissioner's dismissal of the petition for reassessment. We therefore affirm the BTA's decision.

Decision affirmed

MOYER, C'J., and PFEIFER, LUNDBERG, STRATTON, O'CONNOR, O'DONNELL, LANZINGER and CUPP, JJ. , concur.

Carl R. Wagenknecht Jr., pro se

Nancy Hardin Rodgers, Attorney General, and Damion M .Clifford , Assistant Attorney General, for appellee.

THE SUPREME COURT OF OHIO

Carl R. Wagenknecht Jr	Case No. 2008-0095
v.	JUDGMENT ENTRY
William W. Wilkins [Richard A, Levin], Tax Commissioner Of Ohio	APPEAL FROM THE BOARD OF TAX APPEALS

This cause , here on appeal from the Board of Tax Appeals, was considered in the manner prescribed by law. On consideration thereof, the decision of the Board of Tax Appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that a mandate be sent to the Board of Tax Appeals by certifying a copy of this judgment entry and filing it with the Board of Tax Appeals.

(Board of Tax Appeals; No. 2006T1007)

/s/ Thomas J.Moyer
THOMAS J. MOYER
Chief Justice

Filed: December 31, 2008

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Wagenknecht v. Levin*, Slip Opinion No. 2008-Ohio-6812]

NOTICE
This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio. 65 South Front Street, Columbus , Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

Slip Opinion No. 2008-Ohio-6812

Wagenknecht, Appellant, v. Levin Tax Commr., Appellee

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Wagenknecht v. Levin*, Slip Opinion No. 2008-Ohio-6812

R.C. 5747.10 – *Petition for reassessment – Failure to make required payment on the assessment – Board of Tax Appeals decision affirmed.*

(No.2008-0095 – December 17, 2008 – Decided December 31, 2008)

APPEAL from the Board of Tax Appeals.
No. 2006-T-1007

Per Curiam.

{¶1} Appellant , Carl R. Wagenknecht Jr., contests an assessment of unpaid personal income tax as to the 1996 tax year, which the Tax Commissioner issued against him on December 8, 2005. Wagenknecht initiated the present proceedings by filing a petition for reassessment, dated February 7, 2006. The commissioner's final determination , issued on May 19, 2006, dismissed the petition on jurisdictional grounds. On appeal, the Board of Tax Appeals("BTA") granted the commissioner's motion and summarily affirmed that dismissal. After a careful review of the record in light of Wagenknecht's arguments, we find no legal error, and we affirm the BTA.

Background

{¶2} This case originates in a redetermination by the Internal Revenue Service("IRS") of Wagenknecht's adjusted gross {"AGI") for 1996. When the IRS makes such an adjustment, R.C. 5747.10 requires an Ohio taxpayer to file an amended Ohio return that incorporates the new AGI figure and computes its

effect on the Ohio tax liability for that year. The Tax Commissioner found that Wagenknecht had failed to file the required Ohio personal income tax return and proceeded to compute an Ohio income-tax deficiency based on the new AGI figure. The commissioner also found that "[t]here is no further pending action before the Internal Revenue Service pertaining to this taxpayer for this tax year" and that "[t]he assessment by the Internal Revenue Service has been finally determined" Finally, because Wagenknecht had failed to make the required payment on the assessment as required by R.C. 5747.13(E)(2), the commissioner ruled that he lacked jurisdiction to consider the. petition.

{¶3} Wagenknecht timely filed his notice of appeal at the Board of Tax Appeals on August 3, 2006, asserting among other things that the commissioner had erred by denying jurisdiction under R.C. 5747.13: the applicable division of R.C. 5747.13, according to Wagenknecht, was R.C. 5747.13(E)(8), not R.C. 5747.13(E)(2). Additionally, Wagenknecht contended that the commissioner had erred by finding that '[t]here is no further pending action before the Internal Revenue Service pertinent to this taxpayer for this tax year" and pointed to two cases, one pending in the United States Tax Court and one in the United States District Court.

{¶4} At the BTA, the commissioner filed a motion to affirm his final determination, which Wagenknecht opposed. Wagenknecht's response reiterated his assertions that R.C. 5747.13(E)(2)

with its prepayment requirement did not apply, and he referred once more to two cases pertaining to tax year 1996 that were pending in federal courts. Wagenknecht also filed subpoenas to summon witnesses to a hearing at the BTA and submitted a number of proposed hearing exhibits.

{¶5} On December 21, 2007, the BTA granted the commissioner's motion and affirmed his determination. The BTA found that the exiting record established that the IRS had increased Wagenknecht's 1996 federal AGI by $308,600. Although the adjustments altered his Ohio income tax liability, the BTA found that Wagenknecht "failed to file an amended return with [the commissioner], as required by R.C. 5747.10," with the result that "payment of the assessment. i.e. the tax and interest, became a condition precedent to Mr. Wagenknecht's ability to have the assessment reviewed" under R.C. 5747.13(E)(2). Because the record showed that Wagenknecht had not paid, the BTA concluded that the commissioner was without jurisdiction to consider Mr. Wagenknecht's petition for reassessment. By granting the commissioner's motion, the BTA in effect denied Wagenknecht's hearing, even with respect to jurisdictional issues.

{¶6} On appeal to this court, Wagenknecht urges three propositions of law that broadly contest his obligation to file tax returns. Subsumed within the sweep of his arguments is, once again, the contention that the prepayment of the assessment is not required on account of Wagenknecht's

having allegedly "filed any required return that is applicable for 1996." Wagenknecht also faults the BTA for denying him a hearing, in particular one devoted to the jurisdictional issues.

{¶7} We hold that the BTA acted reasonably and lawfully when it affirmed the commissioner's dismissal for nonpayment of the assessment. We therefore affirm.

Analysis

I. Wagenknecht failed to file the amended return that Ohio law requires.

{¶8} As we recently discussed in *Gibson v. Levin*, 119 Ohio St. 3d 517, 2008-Ohio-4828, 895 N.E.2d 548, ¶ 2, R.C. 547.13(E)(2) requires prepayment when the taxpayer has not filed an original or an amended return as required by statute. In this case, the BTA affirmed the commissioner, who had issued an assessment based on a federal adjustment to the AGI reported on the 1996 tax return. Although, Wagenknecht originally filed an Ohio tax return for 1996, he did not file an amended return after the IRS adjusted the AGI figure. An amended return is specifically required by R.C. 5474.10 "not later than sixty days after the adjustment has been agreed to or finally determined for federal income tax purposes or any federal income tax deficiency or refund , the abatement or credit resulting therefrom , has been assessed or paid, whichever occurs first." In a situation such as that presented in this case, therefore, the taxpayer may not rely on the filing of

the original return to pursue his petition for reassessment. *Gibson* ¶ 8.

{¶9} In his brief and at his oral argument, Wagenknecht referred to an affidavit he allegedly submitted to the Department of Taxation in April 2000.[1] He suggests that submitting such an affidavit may substitute for the filing of an amended return pursuant to R.C. 5747.10. That is mistaken for one overriding reason. R.C. 5747.10 specifically requires that an amended return be submitted "in such form as the commissioner requires." The affidavit plainly does not equate to the Form IT-1040X, the standard amended return published by the Ohio Department of Taxation, or to any other form prescribed by the commissioner. Accordingly, Wagenknecht did not file an amended return pursuant to R.C. 5747.10.

2. The IRS had "finally determined" Wagenknecht's AGI.

{¶10} The Tax Commissioner's determination recited that the IRS assessment had been "finally determined." On appeal of that determination, Wagenknecht had the burden to prove that finding to be clearly unreasonable or unlawful. See *Nusseibeh v. Zaino*, 98 Ohio St.3d. 292, 2003-Ohio-855, 784 N.E.2d. 93. ¶10. The BTA correctly concluded that the taxpayer failed to carry the burden.

---

[1] The document was attached as an exhibit to a brief filed at the BTA but does not constitute a part of the statutory transcript certified by the commissioner to the BTA.

{¶11} Before this court, Wagenknecht renews his contention that the federal liability remains in dispute in the two federal cases. That argument fails because recent decisions issued by the federal courts in both cases show that the relevant substantive issue – the amount of Wagenknecht's 1996 AGI - is not, as a matter of federal procedural law, a viable issue in either case. First, Wagenknecht cites case No. 06-00726 in the United States District Court for the Northern District of Ohio. But the United States Court of Appeals for the Sixth Circuit recently affirmed the district court's dismissal of the part of Wagenknecht's complaint that related to the amount of federal tax liability on the grounds that jurisdiction "related to income tax liabilities lies solely in the Tax Court." *Wagenknecht v. United States*(C.A.6, 2008), 533 F.3d 412, 416.

{¶12} As for the Tax Court case, that court decided on July 29, 2008 that the "underlying tax liability" was not properly before the court because of a procedural default by Wagenknecht. *Wagenknecht v. Commr. Of Internal Revenue* (2008), T.C. Memo. 2008-179. Indeed , the tax court granted complete summary judgment to the government.

{¶13} But even if Wagenknecht could argue that further appeals will vindicate his position, another event triggered the unfilled requirement that he file the amended return under R.C. 5747.10. The commissioner found that the IRS had *assessed* the federal deficiency against

Wagenknecht, and Wagenknecht never proposed to show that the act of assessment did not occur.[1] Under R.C. 5747.10, the federal government's act of assessing the deficiency triggers the filing requirement, regardless of the finality of the federal determination.

{¶14} Accordingly, because Wagenknecht was required to file an amended return and failed to do so, he was obligated to prepay the Ohio assessment in order to receive a hearing on his petition for reassessment.

3. The amended-return filing requirement was not unreasonable

{¶15} Wagenknecht also contends that Ohio law should not be construed to require him to file a return declaring, under penalties of perjury, an adjusted tax liability so long as he continues to dispute it. This argument fails for two reasons. First, Wagenknecht's federal AGI had been "finally determined." So that his personal disagreement with that figure was no longer legally significant. R.C. 5747.10(A) required him to file an Ohio amended return and pay the amount of any deficiency. Second, Wagenknecht overlooks the possibility of filing correspondence along with the

---

[1] Indeed, the United States Tax Court stated that the IRS assessed the federal deficiency for 1996 on January 10, 2003. T.C. Memo 2008-179 at 5. Ordinarily, we do not refer to decisions of other courts in collateral cases to determine the operative facts in a case pending before this court. In the present case however, referring to the federal decisions, for the assessment date is not improper , because Wagenknecht places them at issue when he argues that those cases show a continuation of the federal dispute.

return that could express his reservations about the federal assessment.

{¶16 } Moreover, filing the amended return without prepayment would not have precluded Wagenknecht from asserting his claim that the federal assessment is substantively wrong. If Wagenknecht had filed the amended return but withheld payment , he could have pursued his petition for reassessment on the merits without prepaying.

4. Wagenknecht advances substantive arguments that may not be heard.

{¶17} Wagenknecht asserts that the federal government committed factual and legal errors when it assessed a deficiency against him. His theories include the contention that he is not required to file a federal Form 1040 because of IRS noncompliance with the federal Paperwork Reduction Act and the nonapplicabilty of Form 1040 to the general public. Additionally, Wagenknecht maintains that the commissioner may not rely on the validity of a federal assessment when he issues an assessment for the failure to pay under R.C. 5747.10(A) – on this view, the commissioner may issue his own assessment only after performing an independent determination of the validity of the federal assessment.

{¶18} These arguments raise challenges to the merits of the assessment. Ordinarily such arguments would be considered and resolved through the petition for reassessment. But Wagenknecht failed to invoke the commissioner's

jurisdiction because he neither filed the amended return nor paid the reassessment.

{¶19} Although Wagenknecht appears to treat his substantive arguments as bearing on the jurisdiction issue, they do not . The substantive arguments contest the *validity of the commissioner's assessment*; they do not , even if meritorious, release Wagenknecht from the duties under R.C. 5747.10 or 5747.13(E)(2) either to have filed the amended return or to pay the assessment in order to receive consideration of his petition for reassessment.

5. Wagenknecht was not entitled to a hearing at the BTA

{¶20} Wagenknecht sought a hearing at the BTA, and in his notice of appeal to the court he stated that the BTA "erred by not allowing Appellant to present evidence at a hearing before the Board (which evidence was proffered in Appellant's Response In Opposition To Appellee's Motion To Affirm The Tax Commissioner's Final Determination), to prove that the Appellant was not required to make payment with the Petition for Reassessment." In *Brown v. Levin*, 119 Ohio St.3d. 335, 2008-Ohio-4081, 894 N.E.2d 35, ¶ 10, we noted that R.C. 5717.02, the statute that governs appeals from determination of the Tax Commissioner, states that "upon the application of any interested party" the BTA "shall order the hearing of additional evidence." We observed that the mandatory language of R.C. 5717.02 implied "as a general matter, that the BTA has no power

analogous to that of a court in a civil action to grant summary judgment under Civ. R. 56 or dismissal for failure to state a claim under Civ.R. 12(B)(6)." Id. ¶11. Against that background, we must address the question whether the BTA could decline to hold a hearing and affirm the dismissal of the petition for reassessment.

{¶21} We hold that the BTA properly issued a summary affirmance. The only legitimate *jurisdictional* issues in the case concerned (1) Wagenknecht's obligation to file an amended return under R.C. 5747.10 and (2) his obligation to prepay under R.C. 5747.13(E)(2). Quite simply, the factual proof that Wagenknecht proposed to present at the BTA related to the procedural and substantive validity of the commissioner's assessment , not to the commissioner's jurisdiction to consider the petition. Although Wagenknecht did offer to prove the pendency of the federal cases; he never offered to prove that the federal government had not issued an assessment - an event that by itself triggers the requirement to file the amended return. Nor did he assert that he had in fact paid the assessment. Under these circumstances , the BTA correctly found an absence of jurisdiction as a matter of law. As we have held , a litigant's right to a hearing under R.C. 5717.02 does not encompass a right to present evidence on points that are not jurisdictionally before the BTA. See *Brown*, 119 Ohio St.3d 335, 2008-Ohio-4081, 894 N.E.2d 35, ¶24

Conclusion

{¶22} For all the foregoing reasons, the BTA acted reasonably and lawfully when it affirmed the commissioner's dismissal of the petition for reassessment. We therefore affirm the BTA's decision.

Decision affirmed

MOYER, C.J., and PFEIFER, LUNDBERG, STRATTON, O'CONNOR, O'DONNELL, LANZINGER and CUPP, JJ., concur.

Carl R. Wagenknecht Jr., pro se

Nancy Hardin Rodgers, Attorney General, and Damion M. Clifford, Assistant Attorney General, for appellee.

OHIO BOARD OF TAX APPEALS

Carl R. Wagenknecht Jr.	)	
Appellant,	)	CASE NO. 2006-T-1007
vs.	)	(PERSONAL INCOME TAX)
Williams W. Wilkins, Tax Commissioner of Ohio	)	DECISION AND ORDER
Appellee.	)	

APPERARNCES:

For the Appellant – Carl R. Wagenknecht Jr ,pro se
174 Cheltenham Lane
Munroe Falls, Ohio 44262

For the Appellee - Marc Dann
Attorney General of Ohio
Damion M. Clifford
Assistant Attorney General
Taxation Section
State Office Tower, 25th Floor
30 East Broad Street
Columbus, Ohio 43215

Entered: Dec 21, 2007

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

The Tax Commissioner has filed with this board a motion, in which he asks to affirm his final determination. In that final determination, issued on May 19, 2006, the commissioner determined that he lacked subject-matter jurisdiction over Mr. Wagenknecht's petition for reassessment because Mr. Wagenknecht had failed to pay the assessment , as the required by R.C. 5747.13. We now consider this matter pursuant to the commissioner's ,motion and the memoranda filed by the parties.[1]

Every tax payer who is liable for income earned or received in this state is required to file an annual income tax return. R.C. 5747.08. Returns must be filed, annually, on the fifteenth day of April. R.C. 5747.08(G). If, however, a taxpayer's annual income tax liability "must be altered as the result of an adjustment to the taxpayer's federal income tax return, whether

[1] We observe that Mr. Wagenknecht specifies several errors in his notice of appeal and further addresses those specifications in his memorandum contra the commissioner's motion to affirm. However, this board's jurisdiction is limited to those issues considered by the commissioner in his final determination. As the only issue addressed by the commissioner was his lack of jurisdiction over the petition for reassessment, our jurisdiction is likewise limited to a review of that issues. *Schroeder Paper Specialty Co. Tracy* (Sept. 20, 1996), BTA No. 1996-T-31, unreported.

initiated by the taxpayer or the internal revenue service, and such alteration affects the taxpayer's tax liability ***, the taxpayer shall file an amended return with the tax commissioner in such form as the commissioner requires." R.C. 5747.10.

The record before us establishes that the Ohio Department of Taxation("ODT") obtained information from the Internal Revenue Service ("IRS") that Mr. Wagenknecht's 1996 Federal Adjusted Gross Income had been increased by $308,600 as a result of a review performed by the IRS and the determination of the IRS Office of Appeals. Although the adjustments altered his Ohio income tax liability, Mr. Wagenknecht failed to file an amended return with ODT, as required by R.C. 5747.10. On March 8, 2005 ODT informed Mr. Wagenknecht of the deficiency and the amount now due. S.T. at 291. ODT subsequently issued an assessment for the delinquency on December 8, 2005. S.T. at 295. The assessment was in the amount of $30,906, including penalty and interest. S.T. at 291, 295.

Mr. Wagenknecht filed a timely petition for reassessment but did not pay the assessment . S.T. at 1, 28. Subsequently, the Tax Commissioner dismissed the petition because of the failure to pay the assessment at the time the petition was filed. S.T. at 1. The commissioner now asserts that we must affirm the dismissal. We agree.

Pursuant to R.C. 5747.13 , a taxpayer's ability to challenge an income tax assessment is specifically dependent upon the payment of the

assessment. Under R.C. 5747.13(B), a taxpayer must file a petition for reassessment within sixty days after service of the notice of assessment. R.C. 5747.13(E) further provides:

"The portion of an assessment that must be paid upon the filing of a petition for reassessment shall be as follows:

***

"(2) *If the taxpayer* or qualifying entity that is assessed *failed to file, prior to the date of issuance of the assessment,* the annual return or report required by section 5747.08 or 5747.42 of the Revised Code, *any amended return or amended report required by section 5747.10* or 5747.45 of the Revised Code for the taxable year at issue, or any report required by division (B) of section 5747.05 of the Revised Code to indicate a reduction in the amount of the credit provided under that division, *payment of the assessment, including interest but not penalty, is required,* except as otherwise provided under division (E)(6) or (7) of this section***." (Emphasis added)

Based upon the foregoing, payment of the assessment , i.e. the tax and interest, became a condition precedent to Mr. Wagenknecht's ability to have the assessment reviewed. The right to contest an assessment specifically depends upon of the payment of the assessment upon the filing of a

petition for reassessment . See *W.T. Grant Co. v. Lindley* (1977), 50 Ohio St.2d 7, 8; *Niemeyer V. Collins* (1976), 45 Ohio St.2d 63, 64-65; and , *Pre-Fab Transit Co. v. Bowers*(1964) 176 Ohio St. 163. In the instant matter; the amount of tax and interest necessary to be paid to invoke the commissioner's jurisdiction over the petition was $30, 756. The record shows that Mr. Wagenknecht made no payment, consequently, the commissioner was without jurisdiction to consider Mr. Wagenknecht's petition for reassessment.

Mr. Wagenknecht nevertheless argues that payment was not required because the assessment was barred by the statute of limitations contained in R.C. 5747.13(A). However, although the four-year statute of limitations imposed upon the state under R.C. 5747.13(A) limits the ability of the state to issue an assessment upon a return, the statute does not bar an assessment against a taxpayer who fails to file an amended return pursuant to R.C. 5747.10. *Gibson v. Limbach* (1991), 74 Ohio App.3d. 498, motion to certify overruled (1991), 62 Ohio st. 3d. 1445 (holding that because "appellants failed to file a return that was subject to an assessment (i.e., an amended return), the statute of limitations on the state assessment, which was the result of the federal adjustments, has not commenced to run"); *Waring v. Wilkins* (Aug. 19, 2005), BTA No. 2004-V-626, unreported. Cf. *McLean Trucking Co. v. Lindley* (1982), 70 Ohio St. 2d 106. Here, the record establishes that Mr.

Wagenknecht failed to file the amended return required under R.C. 5747.10.

Based upon the foregoing , the Board of Tax Appeals finds that Mr. Wagenknecht failed to invoke the commissioner's subject–matter jurisdiction due to a failure to comply with the provisions of R.C. 5747.13. We therefore conclude that the final determination is supported by a preponderance of the evidence and is in accordance with law. Accordingly, the Board of Tax Appeals herby affirms the Tax Commissioner's final determination.

I hereby certify the foregoing to be true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

/s/ Sally F. Van Meter
Sally F. Van Meter, Board Secretary

Ohio Department of TAXATION
Office of the
Tax Commissioner
30 E. Broad St. 22 floor
Columbus, OH 43215

FINAL DETERMINATION

Date: May 19 2006

Carl R. Wagenknecht, Jr.
Jacqueline J. Miller-Wagenknecht
174 Cheltenham Ln.
Munroe Falls, OH 44262

Re: Assessment Nos. 02200532748027
Ohio Personal Income Tax
Tax Year: 1996

This is the final determination of the Tax Commissioner on a petition for reassessment under R.C. 5747.13 concerning the following personal income tax assessment:

Tax	Interest	Penalty	Total
$19,964.00	$10,792.00	$150.00	$30.906.00

This assessment resulted from information obtained from the Internal Revenue Service under the authorization of Section 6103(d) of the Internal Revenue Code. The petitioner failed to file the required Ohio personal income tax return. Consequently, the Ohio Department of Taxation calculated his Ohio income tax based upon the federal adjusted gross incomes reported by the

Internal Revenue Service.[1] This resulted in the above assessment.

> R.C. 5747.13 requires the following:
>
> (E) The portion of an assessment which must be paid upon the filing of a petition for reassessment shall be as follows: ***
>
> (2) If the taxpayer or qualifying entity that is assessed failed to file, prior to the date of issuance of the assessment, the annual return or report required by section 5747.08 or 5747.42 of the Revised Code, any amended return or amended report required by section 5747.10 or 5747.45 of the Revised Code for the taxable year at issue, or any report required by division (B) of section 5747.05 of the Revised Code to indicate a reduction in the amount of credit provided under that division, payment of the assessment, including interest but not penalty, is required***

The petitioner failed to make the required payment on the assessment when submitting the petition for reassessment. There is no jurisdiction to consider the petition.

---

[1] This information reports the final Federal Adjusted Gross Income for the taxpayer. There is no further pending action before the Internal Revenue Service pertaining to this taxpayer for this tax year. The assessment by the Internal Revenue Service has been finally determined.

Accordingly, the petition is dismissed.

Current records indicate that no payments have been made on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total. Payments shall be made payable to 'Treasurer, State of Ohio.' Any payment made within sixty days of the date of this final determination should be forward to: Department of Taxation, Office of Chief Counsel, State Office Tower, 23rd Floor, 30 East Broad Street, Columbus, Ohio 43215.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS A TRUE AND
ACCURATE COPY OF THE FINAL
DETERMINATION RECORDED IN THE
TAX COMMISSIONER'S JOURNAL

/S/ Williams W. Wilkins
WILLIAM W. WILKINS
TAX COMMISSIONER

/S/ William W. Wilkins
William W. Wilkins
Tax Commissioner

Constitutional Provisions, Statutes, Rules and Regulations Not Reproduced In Petition

First Amendment, United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Tenth Amendment, United States Constitution

The powers not delegated to the United States by the Constitution, nor prohibited by it to

the States, are reserved to the States respectively, or to the people.

The CONSTITUTION of the STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

¶ I Inalienable Rights,

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

¶16 Redress in courts

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts, and in such manner, as may be provided by law.

STATUTUES

28 USC 1746 Unsworn declarations under penalty of perjury states:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement

made pursuant to law ,any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration , verification, certificate, statement, oath, or affidavit, in writing of the person making the same(other than a deposition , or an oath of office, or an oath required to be taken before a specific official other than a notary public), such matter may with like force and effect , be supported , evidenced, established, or proved by the unsworn declaration , certificate, verification, or statement in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(signature)"

(2) If executed within the United States, its territories, possessions, or commonwealth: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)."

(signature)"

ORC 5703.25 Returns, claims, and reports need not be sworn to - perjury statement.

All tax returns, claims, or reports with respect to taxes, including accompanying schedules and statements, which are required by law to be filed with the department of taxation, the treasurer of state, a county auditor, or a county treasurer need not be sworn to. Any such return, claim, or report shall have printed on it the following statement, which shall be subscribed to by the person signing such return, claim, or report: "I declare under penalties of perjury that this return or claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return and report."

ORC 5703.26 Prohibition against making a false or fraudulent report, return, schedule, statement, claim, or document.

No person shall knowingly make, present, aid, or assist in the preparation or presentation of a false or fraudulent report, return, schedule, statement, claim, or document authorized or required by law to be filed with the department of taxation, the treasurer of state, a county auditor, a county treasurer, or a county clerk of courts, or knowingly procure, counsel, or advise the preparation or presentation of such report, return, schedule, statement, claim, or document, or knowingly change, alter, or amend, or knowingly

procure, counsel, or advise such change, alteration, or amendment of the records upon which such report, return, schedule, statement, claim, or document is based with intent to defraud the state or any of its subdivisions.

With respect to such acts or conduct, no conviction shall be had under any other section of the Revised Code.

ORC 5747.10 Amended returns

If any of the facts, figures, computations, or attachments required in a taxpayer's annual return to determine the tax charged by this chapter or Chapter 5748, of the Revised Code must be altered as the result of an adjustment to the taxpayer's federal income tax return, whether initiated by the taxpayer or the internal revenue service, and such alteration affects the taxpayer's tax liability under this chapter or Chapter 5748, of the Revised Code, the taxpayer shall file an amended return with the tax commissioner in such form as the commissioner requires. The amended return shall be filed not later than sixty days after the adjustment has been agreed to or finally determined for federal income tax purposes or any federal income tax deficiency or refund, or the abatement or credit resulting therefrom, has been assessed or paid, which occurs first.

(A) In the case of an underpayment, the amended return shall be accompanied by payment of any

combined additional tax due together with interest thereon. If the combined tax shown to be due is one dollar or less, such amount need not accompany the amended return. An amended return required by this section is a return subject to assessment under section 5747.13 of the Revised Code for the purpose of assessing any additional tax due under this section, together with any applicable penalty and interest. It shall not reopen those facts, figures, computations, or attachments from a previously filed return no longer subject to assessment that are not affected, either directly or indirectly, by the adjustment to the taxpayer's federal income tax return.

(B) In the case of overpayment , an application for refund may be filed under this division within the sixty-day period prescribed for filing the amended return even if it is filed beyond the period prescribed in section 5747.11 of the Revised Code if it is otherwise conforms to the requirements of such section. An application filed under this division shall claim refund of overpayments resulting from the alterations to only those facts, figures, computations, or attachments required in the taxpayer's annual return that are affected, either directly or indirectly, by the adjustment to the taxpayer's federal income tax return unless it is also filed within the time prescribed in section 5747.11 of the Revised Code. It shall not reopen those facts, figures, computations, or attachments that are not affected, either directly or indirectly,

by the adjustment to the taxpayer's federal income tax return.

ORC 5747.13 Liability for failure to file return or collect or remit taxes; assessment; petition for reassessment

(A) If any employer collects the tax imposed by section 5747.02 or under Chapter 5748 of the Revised Code and fails to remit the tax as required by law, or fails to collect the tax, the employer is personally liable for any amount collected that the employer fails to remit, or any amount that the employer fails to collect. If any taxpayer fails to file a return or fails to pay the tax imposed by section 5747.02 or under Chapter 5748 of the Revised Code, the taxpayer is personally liable for the amount of the tax.

If any employer, taxpayer, or qualifying entity required to file a return under this chapter fails to file the return within the time prescribed, files an incorrect return, fails to remit the full amount of the taxes due for the period covered by the return, or fails to remit any additional tax due as a result of a reduction in the amount of the credit allowed under division (B) of section 5747.05 of the Revised Code together with interest on the additional tax within the time prescribed by that division, the tax commissioner may make an assessment against any person liable for any deficiency for the period

for which the return is or taxes are due, based upon any information in the commissioner's possession.

An assessment issued against either the employer or the taxpayer pursuant to this section shall not be considered an election of remedies or a bar to an assessment against the other for failure to report or pay the same tax. No assessment shall be issued against any person if the tax actually has been paid by another.

No assessment shall be made or issued against an employer, taxpayer, or qualifying entity more than four years after the final date the return subject to assessment was required to filed or the date the return was filed, which is later. However, the commissioner may assess any balance due as the result of a reduction in the credit allowed under division (B) of section 5747.05 of the Revised Code, including applicable penalty and interest within four years of the date on which the taxpayer reports a change either the portion of the taxpayer's adjusted gross income subjected to an income tax or tax measured by income in another state or the District of Columbia, or the amount of liability for an income tax or tax measured by income to another state or the District of Columbia, as required by division (B)(3) of section 5747.05 of the Revised Code. Such time limits may be extended if both the employer, taxpayer, or qualifying entity and the commissioner consent in writing to the extension or if an agreement waiving

or extending the time limits has been entered into pursuant to section 122.171[122.17.1] of the Revised Code. Any such extension shall extend the four-year time limit in division (B) of section 5747.11 of the Revised Code for the same period of time. There shall be no bar or limit to an assessment against an employer for taxes withheld from the employees and not remitted to the state, against an employer, taxpayer, or qualifying entity that fails to file a return subject to assessment as required by this chapter, or against an employer, taxpayer, or qualifying entity that files a fraudulent return.

The commissioner shall give the party assessed written notice of the assessment in the manner provided in section 5703.37 of the Revised Code. With the notice, the commissioner shall provide instructions on how to petition for reassessment and request a hearing on petition.

(B) Unless the party assessed files with the tax commissioner within sixty days after service of the notice of assessment, either personally or by certified mail, a written petition for assessment, signed by the party assessed or the party's authorized agent having knowledge of the facts, the assessment becomes final , and the amount of the assessment is due and payable from the party assessed to the commissioner with remittance made payable to the treasurer of the state. The petition shall indicate objections of the party

assessed, but additional objections may be raised in writing if received by the commissioner prior to the date shown on the final determination. If the petition has been properly filed, the commissioner shall proceed under section 5703.60 of the Revised Code.

(C) After an assessment becomes final, if any portion of the assessment remains unpaid, including accrued interest, a certified copy of the tax commissioner's entry making the assessment final may be filed in the office of the clerk of the court of common pleas in the county in which the employer's, taxpayer's, or qualifying entity's place of business is located or the county in which the party assessed resides. If the party assessed is not a resident of this state, the certified copy of the entry may be filed in the office of the clerk of the court of common pleas of Franklin county.

Immediately upon the filing of the entry, the clerk shall enter a judgment against the party assessed in the amount shown on the entry. The judgment shall be filed by the clerk in one of the two loose-leaf books, one entitled "special judgments for state and school district income taxes," and the other entitled "special judgments for qualifying entity taxes." The judgment shall have the same effect as other judgments. Execution shall issue upon the judgment upon the request the tax commissioner, and all laws applicable to sales on execution shall apply to sales made under the judgment.

The portion of the assessment not paid within sixty days after the assessment was issued shall bear interest at the rate per annum prescribed by section 5703.47 of the Revised Code from the day the tax commissioner issues the assessment until it is paid. Interest shall be paid in the same manner as the tax and may be collected by the issuance of an assessment under this section.

(D) All money collected under this section shall be considered as revenue arising from the taxes imposed by the chapter or Chapter 5733 or 5748 of the Revised Code, as appropriate.

(E) The portion of an assessment that must be paid upon the filing of a petition for reassessment shall be as follows:

(1) If the sole item objected to is the assessed penalty or interest, payment of the assessment, including interest but not for penalty, is required;

(2) If the taxpayer or qualifying entity that is assessed failed to file, prior to the date of issuance of the assessment, the annual return or report required by section 5747.08 or 5747.42 of the Revised Code, any amended return or amended report required by section 5747.10 or 5747.45 of the Revised Code for the taxable year at issue, or any report required by division (B) of section 5747.05 of the Revised Code to indicate a reduction in the

amount of the credit provided under that division, payment of the assessment, including interest but not penalty, is required, except as otherwise provided under division (E)(6)or (7) of this section;

(3) If the employer assessed had not filed, prior to the date of issuance of the assessment, the annual return required by division (E)(2) of section 5747.07 of the Revised Code covering the period at issue, payment of the assessment, including interest but not penalty, is required;

(4) If the taxpayer or qualifying entity that is assessed filed, prior to the date of issuance of the assessment, the annual return or report required by section 5747.08 or 5747.42 of the Revised Code, all amended returns or reports require by section 5747.10 or 5747.45 of the Revised Code for the taxable year at issue, and all reports required by division (B) of section 5747.05 of the Revised Code to indicate a reduction in the amount of the credit provided under that division, and a balance of the taxes shown due on the returns or reports as computed on the returns or reports remains unpaid, payment of only that portion of the assessment representing the unpaid balance of the tax and interest is required;

(5) If the employer assessed filed, prior to the date of issuance of the assessment, the annual return required by division (E)(2) of the section 5747.07 of the Revised Code covering the period at issue, and

a balance of the taxes shown due on the return as computed on the return remains unpaid, payment of only that portion of the assessment representing the unpaid balance of tax and interest is required;

(6) In the case of a party assessed as a qualifying entity subject to the tax levied under section 5733.41 or 5747.41 of the Revised Code, if the party does not dispute that it is a qualifying entity subject to that tax but claims the protections of section 101 of Public Law 86-272, 73 Sta. 555, 15 U.S.C.A. 381, as amended, no payment is required;

(7) In the case of a party assessed as a qualifying entity subject to the tax levied under section 5733.41 or 5747.41 of the Revised Code, if the party does dispute that it is a qualifying entity subject to that tax, no payment is required;

(8) If none of the conditions specified in divisions (E)(1) to (7) of this section apply; no payment is required.

(F) Notwithstanding the fact that a petition for reassessment is pending, the petitioner may pay all or a portion of the assessment that is the subject of the petition. The acceptance of a payment by the treasurer of state does not prejudice any claim for refund upon final determination of the petition.

If upon final determination of the petition an error in the assessment is corrected by the tax

commissioner, upon petition so filed or pursuant to a decision of the board of tax appeals or any court to which the determination or decision has been appealed , so that the amount due from the party assessed under the corrected assessment is less than the portion paid, there shall be issued to the petitioner or to the petitioner's assigns or legal representative a refund in the amount of the overpayment as provided by section 5747.11 of the Revised Code, with interest on that amount as provided by such section, subject to section 5747.12 of the Revised Code.